Supreme Court, U. S.
FILED
MAR 20 1975
MICHAEL RODAK, JR., CLERK

No. 73-1971

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

---

1. The appellees—Students Challenging Regulatory Agency Procedures, *et al.* (SCRAP), National Association of Recycling Industries, *et al.* (NARI), and Institute of Scrap Iron and Steel, Inc. (ISIS)—contend that there is no jurisdiction over this direct appeal from the final order of a three-judge court setting aside an order of the Interstate Commerce Commission. We have addressed this contention in our memorandum in opposition to the motions to dismiss, and rely upon our analysis there. Because the district court set aside an order of the Commission, jurisdiction is conferred by 28 U.S.C. 1253 in conjunction with the Urgent Deficiencies Act of 1913, as carried forward into 28 U.S.C. 2321-2325.

Appellees' argument that the district court entered no more than a declaratory judgment is inaccurate, in addition to being (in our view) irrelevant. The court's judgment (J.S. App. B, p. 2b) "vacated" the orders of the Commission and "ordered" the Commission to conduct "further proceedings consistent with the opinion in this case." The opinion required the Commission to prepare a new impact statement and reopen Ex Parte 281 (J.S. App. A, pp. 39a-41a). This language is mandatory, and it is therefore not controlling (for jurisdictional purposes) that the district court declined appellees' additional request for an injunction against the collection of the increased rates.[1]

2. In addition to the issue of appellate jurisdiction, there is another issue concerning the original jurisdiction of the district court. The appellant railroads argue that the Commission's general revenue proceedings are immune from judicial review; the appellees take the contrary position, contending that the district court correctly held that it had jurisdiction in this case. Both sides have cited and discussed the views expressed by the United States and the Commission in prior cases in this Court raising similar questions.[2] We adhere to those views; accordingly, we have not contested and do not challenge now the jurisdiction of the district court.

---

[1]Appellees contend that the only consequence of the district court's order is a change in the burden of proof in future proceedings challenging the rates established. This would be the consequence of the part of the judgment vacating the Commission's order. But if the Commission conducted the "further proceedings" directed by the judgment, it would enter a fresh decision with respect to the rates, and the change in the burden of proof applies only during the pendency of the proceedings until the new order is entered.

[2]*Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (S.D. N.Y.), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C.), both affirmed by an equally divided Court, 400 U.S. 73; *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D. D.C.), affirmed, 401 U.S. 967.

The position taken by the United States and the Commission in the cases cited in note 2, *supra*, is basically this: There is nothing inherently unreviewable about a general revenue order of the Commission authorizing general rate increases after proceedings under 49 U.S.C. 15(7). Therefore, the order is reviewable to the extent that it reflects final administrative decisions. Upon issuance of the order, the Section 15(7) proceedings are complete; consideration of detailed questions about particular rates, however, must await the institution of new proceedings under Section 15(1) by the filing of specific complaints with the Commission under Section 13 (49 U.S.C. 15(1), 13).

Thus, when the challenge to a general revenue order of the Commission focussed solely on particular rates for particular commodities, we have argued[3] that judicial review is unavailable because these are matters the Commission did not finally decide in the Section 15(7) proceedings, and because other remedies (such as a complaint under Section 13) are available. On the other hand, when a general revenue order was challenged on the basis that the Commission erred in determining that the railroads' revenue needs warranted a general increase, we have argued in favor of direct judicial review, because in regard to this matter the Commission had made a final determination.[4]

---

[3]See Motion to Affirm and Supplemental Memorandum for the United States and the Interstate Commerce Commission in *Electronic Industries Ass'n* v. *United States*, *supra* (No. 423, October Term, 1970).

[4]See Brief for United States, the Secretary of Agriculture and the Interstate Commerce Commission in *Atlantic City Electric Co.*, *supra*, and *Alabama Power Co.*, *supra* (Nos. 78 and 106, October Term, 1970), at pp. 18-22.

In this case, appellees broadly attacked the Commission's general revenue order on the basis that the accompanying final environmental impact statement was inadequate. Appellees argued, and the court below held, that the Commission should have considered, in addition to the effect of the general rate increases, "whether the underlying rate structure itself significantly affects the environment" (J.S. App. A, p. 34a). In regard to these matters, the Commission made a decision that was final when issued, and no other forum would appear to be appropriate for a review of the Commission's determinations. This case is therefore analogous to one in which the challenge is directed to the Commission's determination of the railroads' revenue needs, particularly since appellees here alleged the need for an environmental analysis of the entire rate structure. Accordingly, there is no bar to immediate judicial review. While we believe that the appellees' attack is unfounded, the lack of merit in their challenge did not, of course, deprive the district court of jurisdiction to consider their allegations. See *Bell* v. *Hood*, 327 U.S. 678.

3. Appellees SCRAP and ISIS contend that the adequacy of an impact statement must be reviewed under 5 U.S.C. 706(2)(D), which provides that a reviewing court may set aside agency action found to be "without observance of procedure required by law," instead of under the standards we have suggested in our brief.[5] This is a false dichotomy; the problem does not require an "either/or" solution. Each of the standards set out in Section 706(2) is applicable to judicial review of every action of the Commission. *Bowman Transportation, Inc.*

[5] *Lathan* v. *Brinegar*, 506 F.2d 677, 693 (C.A. 9) (*en banc*), held that review under Section 706(2)(D) is appropriate "because NEPA is essentially a procedural statute."

v. *Arkansas-Best Freight System, Inc.*, No. 73-1055, decided December 23, 1974, slip op. 3.

However, review under the standards of Section 706(2)(D) is of little help to appellees because the Commission followed all of the procedures required by NEPA. As we argued in our opening brief, pp. 40-52, the Commission was entitled to allocate to Ex Parte 270 the full investigation of the rate structure, and did not transgress the commands of NEPA by declining to hold an additional oral hearing after it had circulated its draft impact statement.[6] All that remains for review under Section 706(2)(D) is the content of the impact statement. We submit that, if the Commission issues an environmental impact statement on a timely basis, and considers in good faith all of the elements specified in Section 102(2)(C), there has been full compliance (for purposes of Section 706(2)(D)) with the "procedure" established by NEPA. More detailed challenges to the scope of the Commission's environmental analysis, including appellees' claims that additional studies should have been conducted and additional data gathered, simply are not procedural problems, and they more appropriately may be the subject of challenge under the other standards established by Section 706(2).

4. While appellees seek to wage a general (and basically substantive) campaign against the actions of the Commission, they also contend that this Court's review of the conclusions of the district court is limited to setting aside district court conclusions that are "clearly

[6] Even if the Commission's compliance with these procedural steps was less than adequate, not all procedural errors require a reviewing court to set aside the agency's action. Section 706 provides that "due account shall be taken of the rule of prejudicial error." As we contended in our brief, environmental considerations so pervaded Ex Parte 281 that any particular shortcomings in compliance with NEPA procedures did not prevent full and fair considerations of environmental concerns.

erroneous" (ISIS Br. 20-23; SCRAP Br. 45-48). This is an inversion of the correct standard of review.

The conclusions and procedures of the Commission are presumptively correct; the Commission's decisions may be set aside only if the reviewing court can adequately justify such action. *United States* v. *Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320-321; *Bowman Transportation, supra,* slip op. at 4, 10-12. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416. The Commission's decision, rather than that of the district court, is entitled to deference.

The "clearly erroneous" limitation of Fed. R. Civ. P. 52(a), on the other hand, applies only to "findings of fact," not to conclusions of law. When reviewing agency action under Section 706(2) of the Administrative Procedure Act, the district court ordinarily takes no evidence and makes no findings of fact. In the instant case the record before the district court consisted of the record before the Commission and the Commission's reports and conclusions. Any facts "found" were found by the Commission; the district court's function was to review the record and procedures and decide whether, under applicable legal principles, the Commission's actions must be set aside. This function is a purely legal one, and the district court's conclusions are entitled on review to no deference other than that warranted by the force of its reasoning.[7]

5. We have no quarrel with most of the substantive legal propositions of appellees. Under Section 102(2)(C) of NEPA an agency is required to make a good faith effort to analyze the relevant environmental considerations, issue an impact statement presenting these considerations as early as possible during the agency's prodeeding, and take those considerations into account during the

[7]Nor was any deference to the district court's conclusions shown in the recent decision in *Bowman Transportation, supra.*

agency's review process. The Commission's special environmental rules so provide (Br. App. 58-62), as do the guidelines of the Council on Environmental Quality, 40 C.F.R. Part 1500. We agree that the Commission should, in accordance with NEPA and principles established in the lower federal courts, comply with the impact statment requirement to the fullest extent possible, consider environmental factors at all stages of the agency proceeding, and use all practicable means to further the policies and objectives of the Act.

The translation of these general requirements into specific procedures also depends in part on the nature of the function performed by the Commission and the type of decision under consideration. We have argued in our opening brief that general revenue proceedings of the Commission are not typical of the environmental decisions to which NEPA usually applies, and that the Commission's performance of its environmental duties in this case, given the short time available under Section 15(7) of the Interstate Commerce Act and the broad and "general" nature of a general revenue proceeding, adequately fulfilled NEPA's requirements. We add to that discussion only by addressing appellees' (particularly appellee SCRAP, in their brief at 10-13, 57-64) argument that the Commission's subsequently-issued impact statements in Ex Parte 270 and 295 demonstrate the inadequacy of the impact statement in Ex Parte 281.

Since the draft impact statement in this case was released in March 1973, the Commission has continued to accumulate expertise in evaluating the environmental effects of railroad rate changes. Some ongoing studies have begun to produce results, and more quantification of the size of the environmental effect is possible. But it is altogether natural that this should occur, and the accumulation of this body of knowledge, and its employment in more recent impact statements, is not an objection to the adequacy of the environmental consideration in Ex Parte 281. The only question open in this case is

whether the environmental consideration in Ex Parte 281 was adequate in light of the time available for its completion and the environmental data that was known to, or reasonably could have been gathered by, the Commission. That the Commission now has developed the capacity to make more comprehensive estimates of the environmental effects of its rate decisions does not affect our argument that its environmental consideration in Ex Parte 281 fulfilled the commands of NEPA.

The Commission is not required to reopen a general revenue proceeding (once it has been concluded) simply because additional environmental data has come to light, any more than it would be required to reopen such a proceeding if additional estimates of the revenue impact of the change, or the fiscal needs of the railroads, became available. The approval of the general rate increase reflects the Commission's considered judgment that, on the evidence known to it, an increase is not illegal. Subsequently-discovered information can be utilized in subsequent general revenue proceedings, and could affect the Commission's action at that time. It might appropriately be introduced as well in a proceeding challenging the reasonableness of a particular rate. Either of these alternatives would be more in keeping with the nature of general revenue proceedings and with the demands of efficient administration.

But however that may be, the quantification provided in the environmental impact statements in Ex Parte 270 (Sub-Nos. 5 and 6) and Ex Parte 295 (Sub-No. 1) does not impeach the basic conclusions the Commission reached in Ex Parte 281. Both of the more recent impact statements concluded that the environmental effects of small rate increases on recyclables, taking place at the same time

as small rate increases on virgin materials,[8] will be "negligible" or "insignificant."[9] Each impact statement concludes that the results of small rate changes are so small that less than a few tenths of one percent of the scrap movements will be affected (see, *e.g.*, impact statement in Ex Parte 295, Sub-No. 1, at xiv). The more recent analyses therefore support rather than contradict the Commission's earlier analysis, and confirm the accuracy of the impact statement in Ex Parte 281.

Finally, to the extent the more recent studies undermine in any particular the Commission's earlier conclusions, the data they reveal can be the basis for new decisions in present or future general revenue proceedings, and rates can be adjusted to take full account of the newly-disclosed facts. Such a procedure is ongoing in Ex Parte 270 and, as we argued in our brief, the Commission was entitled to allocate to that proceeding,

---

[8]Although an increase in the freight rates for scrap will raise the delivered price of scrap and therefore make it "less attractive," it is inaccurate for appellees to suggest that this demonstrates a significant environmental impact. If a simultaneous increase in the freight rate for virgin materials takes place, scrap will not be relatively disadvantaged, and there will not be any incentive to shift from use of scrap to use of virgin materials, unless an across-the-board increase greater than the level of inflation in the price of the commodities is added to a freight rate structure biased against scrap. But there is no evidence of such a bias (see Br. at 30-32), let alone of a bias aggravated by an increase greater than the rate of increase in the prices of the commodities. The Commission therefore was entitled to conclude that an across-the-board increase would not have a significant environmental impact, while at the same time concluding that a hold-down on the increases for non-ferrous scrap would, by making such scrap relatively more attractive, be environmentally beneficial (cf. SCRAP Br. 52-55). This analysis, and that at pp. 30-32 of our brief, also refutes appellee NARI's contention (at pp. 5-9) that rate increases have produced relative discrimination against non-ferrous scrap.

[9]At p. i of each document.

rather than to particular general revenue proceedings, the full environmental investigation of the basic rates charged by America's railroads.[10]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission.

MARCH 1975.

---

[10]Appellee NARI contends (Br. 51-52) that the Commission "has not embarked upon any investigation of the rate structure for these basic recyclable solid waste materials * * *." Although the Commission denied NARI's request for a separate investigation of non-ferrous scrap, the rates for such scrap *are* under study in Ex Parte 270 (SPC Group Nos. 119-122, main docket) as part of the investigation into all rates and charges by the railroads. The denial of NARI's request meant only that there would not be a separate sub-numbered investigation of such scrap; separate sub-numbered investigations have been confined to a few of the most important commodity groups such as iron ore and steel, coal, wood, and the like. Counsel for NARI is aware of this distinction, and has been requested to submit materials that would bear on the ongoing investigation of the rates of all commodities, including non-ferrous scrap.

DOJ-1975-03

see

7 3

1 9 6 6